(3)

No. 91-785

Supreme Court, U.S.
FILED
JAN 23 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ROSEMARIE CHRISTOPHERSEN,
SURVIVING SPOUSE OF ALBERT ROY CHRISTOPHERSEN,
DECEASED, AND STEVEN ROY CHRISTOPHERSEN,
Petitioners,

v.

ALLIED-SIGNAL CORPORATION, INCO ALLOYS
INTERNATIONAL, INC., UNITED CATALYSTS, INC.,
THE HALL CHEMICAL COMPANY,
MARATHON MANUFACTURING COMPANY, AND
CP CHEMICALS, INC.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

LAURENCE H. TRIBE
Counsel of Record
KENNETH J. CHESEBRO
DAVID HALPERIN
1525 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-1767

PAUL COLLEY, JR.
3301 Golden Road, Suite 310
Tyler, Texas 75701
Counsel for Petitioners

January 23, 1992

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. THIS CASE PRESENTS IMPORTANT LEGAL ISSUES 2

II. CERTIORARI IS WARRANTED ON THE *FRYE* RULE 5

III. CERTIORARI IS WARRANTED ON RULE 703 10

IV. THE CONSTITUTIONAL ISSUES MERIT REVIEW 10

CONCLUSION 10

TABLE OF AUTHORITIES

Cases: **Pages**

Black v. Cutter Laboratories, 351 U.S. 292 (1956) 4n
Daubert v. Merrell Dow Pharmaceuticals, Inc.,
No. 90-55397, 1991 U.S. App. LEXIS 29497
(9th Cir. Dec. 20, 1991) 6, 8
Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) 4, 10
FCC v. Pacifica Foundation, 438 U.S. 726 (1978) 4n
Frye v. United States, 293 F.2d 1013 (D.C.Cir. 1923) . . *passim*
United States v. Jakobetz, No. 91-1125,
1992 U.S. App. LEXIS 322 (2d Cir. Jan. 9, 1992) . 6, 7, 8
United States v. Carver, 260 U.S. 482 (1923) 4n
United States v. Downing, 753 F.2d 1224 (3d Cir. 1985) . . 8n
United States v. Two Bulls, 918 F.2d 56 (8th Cir. 1990) . 7, 8

Statutes and Rules:

Federal Rule of Evidence 403 . . . . . 2, 3
Federal Rule of Evidence 702 . . . . . 4n, 9
Federal Rule of Evidence 703 . . . . . *passim*
Fed.R.App.P. 35(a) 2n
5th Cir.R. 35 IOP 2n

Miscellaneous:

Recent Case, 105 Harv.L.Rev. 791 (1992) 5
Gina Kolata, *Critic of "Genetic Fingerprint" Test Tells of Pressure to Withdraw Paper*, N.Y. Times, Dec. 20, 1991, at A20 . . 7
Rorie Sherman, *DNA Evidence Dispute Escalates*,
Nat'l L.J., Jan. 20, 1992 7
Jack B. Weinstein, *Rule 702 of the Federal Rules of Evidence is Sound; It Should Not Be Amended*, 138 F.R.D. 631 (1991) 9n
Federal Rules: Major Changes Sought By Judicial Conference Working Group, 60 U.S.L.W. 2158 (1991) . . . 9
Fight Erupts Over DNA Fingerprinting,
254 Science 1721 (Dec. 20, 1991) 7

REPLY TO BRIEF IN OPPOSITION

Respondents do not successfully deny that the *en banc* Fifth Circuit below articulated and applied a framework for admission of expert testimony that ignored the plain language of the controlling federal statute. Nor do they deny that other circuits firmly disagree with the legal holdings of the Fifth Circuit, both as to the *Frye* rule and as to Rule 703. Nor do they deny that the decision below and similar decisions in other circuits, all overriding the text of the Federal Rules of Evidence, defeat one of Congress's central aims in enacting the Rules: to ensure that the federal evidentiary framework will not vary from circuit to circuit. Nor do respondents even acknowledge the two major expert testimony decisions announced by the Second and Ninth Circuits after the filing of the Petition but before the filing of the Opposition. These decisions greatly exacerbate the conflict in the circuits surrounding the *Frye* rule, and their issuance in such a short span of time illustrates just how frequently the lower federal courts must grapple with disputes over the meaning of the expert testimony provisions of the Rules -- in part because this Court has never granted review in an expert testimony case as a means of giving the necessary guidance.

Basically oblivious to the above, respondents: (1) emphasize the supposed shakiness of the factual record built by petitioners in this case, (2) argue that the Fifth Circuit could have used different rules (supposedly employed by other circuits) to exclude petitioners' expert testimony on narrow, common-sense grounds, (3) posit that this is therefore not a suitable case for review of the legal issues actually decided by the Fifth Circuit, and (4) suggest that hopefully some more appropriate case will someday emerge.

Exactly the opposite conclusion follows. This is an ideal case for review; the extraordinary decision rendered below should not be permitted to remain on the books. That the Fifth Circuit, rather than remanding the case on an alternative and narrower ground that might have ultimately left petitioners with the same result that they sustained below, would instead plunge ahead with the imposition of a *Frye* rule and a construction of Rule 703 that both flout the plain language of the controlling federal statute, illustrates the urgent need for this Court's review, rather than making review unimportant. This Court should end such evidentiary adventurism, curb the underlying resort to common-law notions of judicial control over evidence policy, and thereby enforce statutory and constitutional regularity in evidence law among the lower federal courts.

I. THIS CASE PRESENTS IMPORTANT LEGAL ISSUES

Most of the Opposition ("Opp.") rests on the absurd claim that "[t]he Fifth Circuit took this case *en banc* to reverse the panel on its facts" and merely concluded, "[a]fter its review of the particular facts in this case, . . . that the district court did not abuse its discretion," Opp. 7. This theme recurs repeatedly, with heavy focus on the details of the specific expert testimony in this case. Respondents urge that the result was correct on the facts, and that any error on the facts would not warrant this Court's attention. *E.g.*, Opp. 1-4 & n.1, 5-6, 17-22, 23-24 & n.6.[1]

Although dissenting opinions below took issue with such factual characterizations, *see* A28-A30, A33, these characterizations will not be addressed in this Reply because they are irrelevant to the case for certiorari -- as a careful study of Chief Judge Clark's opinion below, concurring only in the result, *see* A16-A27, makes obvious. Chief Judge Clark fully *agreed* with the view that the record revealed "erroneous factual assumptions" regarding exposure, and "reasoning and methodology" that were "seriously deficient." A25-A26. On this reading of the record, Chief Judge Clark found it proper to decide the case on a narrow Rule 403 ground cited by the district court, a ground that he believed applied fully to expert testimony, and that had been met here because, in his view, the

[1] Apart from the substantive responses to this claim, *see* pp. 2-5, *infra*, the claim is procedurally insupportable. The rationale for *en banc* review is, after all, to maintain uniformity of precedent and/or to resolve questions of exceptional importance -- not to call on a circuit's entire slate of judges to assess factual issues. *See* Fed.R.App.P. 35(a). Indeed, 5th Cir.R. 35 IOP specifically confirms: "Alleged errors in the determination of . . . the facts of the case (including sufficiency of the evidence), or error asserted in the misapplication of correct precedent to the facts of the case, are matters for panel rehearing but not for rehearing *en banc*." Accordingly, after the original panel opinion reversed the district court's exclusion of expert testimony based on a line of Fifth Circuit precedent requiring that issues concerning the weight of expert testimony be left to the jury (A59, A61, A63-A64), respondents requested *en banc* treatment to override this line of precedent, and to replace it with "more precise guidelines" for expert testimony requiring district courts to "vigilantly scrutinize the basis, reasoning, and conclusiveness of expert testimony" in this and similar cases. Joint Suggestion for Rehearing *En Banc*, filed June 30, 1990, at iv-v. Respondents ultimately achieved this result through the *en banc* majority's purely legal holdings. At no time did respondents urge that *en banc* review be granted or resolved on the basis of the facts alone.

expert testimony's probative value was substantially outweighed by the danger of unfair prejudice. A23-A26. This Rule 403 ground highlights the ambitious project of the *en banc* majority below, because the majority was unwilling to accept, or even to consider, such a narrow ground. As Chief Judge Clark complained, "[w]ith a footnote, the majority dismisses the pertinence of Rule 403 to today's case," even though "[t]he district court's application of Rule 403 is essential to the outcome of the appeal." A24.

Despite his agreement with the majority on the *factual* aspects of the case, Chief Judge Clark argued strenuously that the majority's twin *legal* holdings were fundamentally flawed. Chief Judge Clark was "perplexed" by the majority's disregard for "[t]he plain words of the carefully created, thoroughly reviewed, fully annotated Federal Rules of Evidence," and he criticized the majority for rushing past Rule 403 to create "a homemade test for admissibility which . . . builds in a headwind favoring exclusion of [expert opinion testimony] on a far broader basis than the rules permit." A16. Chief Judge Clark disagreed with the majority's legal holdings under *Frye* and Rule 703 because these holdings relied on common-law notions that could not be squared with the plain language of the Federal Rules of Evidence, Petition ("Pet.") 9-10 -- exactly the basis of the Petition here. Chief Judge Clark's objection did not lie with how the *en banc* majority was *applying* its new legal tests to the facts of this case; like the Petition here, he argued that the majority's holdings are wrong as a matter of law. Our further claim in this Court is that those holdings should be overturned, and that this Court should thereafter remand this case for an analysis of the facts of this case under the proper evidentiary framework.[2]

[2] That proper evidentiary framework will, of course, include Rule 403, and on remand it will be necessary for petitioners to address the proper legal construction of Rule 403, and its application to this case (although this Court might choose to discuss Rule 403 and other relevant aspects of the Rules, in addition to the *Frye* rule and Rule 703, in undertaking its plenary review). That a Rule 403 hurdle remains for remand, however, does not make this case inappropriate for review. Four out of the five judges below who considered the Rule 403 ground concluded that it did not suffice for exclusion of the expert testimony. (The majority, again, refused to consider Rule 403, Pet. 4 n.5; the four dissenters held that Rule 403 did not permit exclusion of the expert testimony on these facts. Pet. 10-11 n.10.) Thus there is no reason to assume that petitioners would lose on remand. In any event, this Court exercises its certiorari jurisdiction to resolve important issues of

In sum, we do not ask for a factual review and disposition; we ask this Court to grant review on important issues of law, and adopt the purely legal conclusions Chief Judge Clark reached in rejecting the *en banc* majority's legal holdings:

(1) That "if *Frye* is a rule of evidence, it has not survived the enactment of the Federal Rules of Evidence," and "if *Frye* is a substantive rule, its adoption in diversity cases is foreclosed by *Erie*," A23; and

(2) That "[i]f the facts or data [underlying an expert's opinion] are *admissible*, Rule 703 does not authorize exclusion of the expert opinion"; if the facts or data are *inadmissible*, "[t]he Rule 703 analysis is not concerned with whether the facts or data relied upon by the expert support the expert's actual opinion" but only with whether the nature of the general "*type* of facts or data relied on" are those on which an expert in the field would rely "in forming opinions on the subject." A19, A21 (emphasis added).

Like Chief Judge Clark, this Court need not concern itself with supposed weaknesses in petitioners' factual record, because the factual record does not affect either the statutory construction issues or the constitutional issues posed by this case. The Fifth Circuit *en banc* majority reached beyond the facts of this case to render important holdings on purely legal issues concerning *Frye* and Rule 703. This Court may, and should, do the same in overruling the

---

federal law where they are properly presented; it does not focus on the likelihood of ultimate success on remand by a particular litigant.

This holds equally true for Rule 702, which need be analyzed only on remand. Neither the district court nor the *en banc* majority held that petitioners' expert testimony was excludable under Rule 702, although the majority did mention that Rule 702 was part of its general "framework" for evidence analysis. *See* A70, A74; *see also* Pet. 4 n.5, 6 n.6. From this bare mention, respondents argue that the courts below would have been correct to rule out the testimony under Rule 702, that the legal errors concerning *Frye* and Rule 703 are somehow "harmless," and that certiorari should be denied on this basis. Opp. 9, 22-26. Chief Judge Clark found this Rule 702 theory bankrupt, *see* A17, but no argument is really necessary. The *judgment* of the court below rests on the twin legal tests championed by the Fifth Circuit, not on Rule 702. This Court "'reviews judgments, not statements in opinions.'" *FCC v. Pacifica Foundation*, 438 U.S. 726, 734 (1978) (quoting *Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956)).

Finally, respondents' listing of earlier denials of certiorari, at Opp. 9-10, overlooks that these "import[] no expression upon the merits of the case, as the bar has been told many times." *United States v. Carver*, 260 U.S. 482, 490 (1923).

Fifth Circuit's approach to these evidence issues.

The obvious importance of this case, and its legal character, have been noted by leading commentators. As the national coverage cited at Pet. 26 n.16 documents, the *en banc* majority's opinion has rested at the center of debate over evidence law since it was issued in August 1991 -- illustrated most recently by a leading law journal's selection of this case as one of the handful of especially important lower court decisions analyzed each year. *See* Recent Case, 105 Harv.L.Rev. 791 (1992).[3] Additionally, this case has already been cited in a well-publicized Ninth Circuit decision extending *Frye* even further than did the *en banc* decision below; this Ninth Circuit decision, together with the decision below, are both in conflict with a later Second Circuit decision which completely rejects use of the *Frye* rule. *See* Point II, *infra*. Respondents are quite alone in regarding the landmark *en banc* decision below as involving a "fact-specific determination" not in conflict with other circuits, and not worthy of this Court's plenary attention. Opp. 7.

II. CERTIORARI IS WARRANTED ON THE *FRYE* RULE

Pages 12-20 of the Petition stated that the common-law *Frye* rule is embraced by most circuits, that only the Third Circuit has clearly rejected it, and that continued use of *Frye* is clearly invalid. Respondents' only sustained response, Opp. 12-16, is to reprint the citations of cases embracing *Frye* listed in Pet. 13-14 n.11, add even more cases, and then claim that *all* circuits use "*Frye*-type methodological tests . . . whether *Frye* is explicitly cited or not," and therefore that "[t]here is no split on this issue." Opp. 12-14 & n.3.

This effort to deny conflict among the circuits is wide of the mark. The thrust of our argument was that *any* use of the *Frye* rule as a means of perpetuating common-law judicial control of the scientific evidence reaching juries sharply conflicts with the plain

---

[3] This six-page analysis barely mentions the facts and quickly grasps the purely *legal* significance of the case: "Although the court in *Christophersen* plainly erred in reading Rule 703 to allow judges to inspect the validity of an expert's factual foundations," given that "Rule 703 does not grant the level of judicial discretion approved by the Fifth Circuit," "the real import of the case is that it breathes new life into the *Frye* rule and counters 'the movement away from the general acceptance test.'" 105 Harv. L. Rev. at 794-95 & n.41 (citation omitted).

terms of a controlling federal statute and with three explicit rulings of this Court rendered under that statute in 1984, 1987 and 1988, Pet. 15-18, and violates three constitutional doctrines recognized by this Court. Pet. 28-30. That a handful of circuits are flouting the clear dictates of both Congress and this Court on such core matters would be enough to warrant review even without any inter-circuit conflict. If respondents are correct that *all* the circuits are flouting Congress and this Court, this only magnifies the case for review.

But there is, in fact, a profound split in the circuits over *Frye* that has undeniable substantive significance. Respondents' claim to the contrary blatantly misconstrues Third Circuit precedent and fails to address two dispositive *Frye* decisions announced after the filing of the Petition but before the filing of the Opposition: the Second Circuit's decision in *United States v. Jakobetz*, No. 91-1125, 1992 U.S. App. LEXIS 322 (2d Cir. Jan. 9, 1992), and the Ninth Circuit's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, No. 90-55397, 1991 U.S. App. LEXIS 29497 (9th Cir. Dec. 20, 1991) (rehearing and rehearing *en banc* sought, Jan. 3, 1992). Both decisions have received national attention, are at opposite poles in the debate over *Frye*, and quite consciously reach results that, the decisions note, conflict with holdings by other circuits.

In *Jakobetz* the Second Circuit elected definitively to scrap the partial reliance on *Frye* noted in Pet. 13 n.13 (*see* slip op. at 25), and it embraced an approach favoring admission of potentially probative, novel scientific evidence, in keeping with the plain meaning of the Federal Rules of Evidence. *See* slip op. at 15-25. In the process the court noted the clear circuit split: "The majority of jurisdictions that have faced similar issues have adopted the *Frye* test, and to this day, it remains the majority rule." *Id.* at 16.

The context of *Jakobetz* and the impetus for its rejection of *Frye* amply illustrate the very reason Congress enacted the expert testimony provisions of the Rules to override common-law restrictions like *Frye* that threatened to block juries from considering new and useful scientific evidence. *See* Pet. 19. *Jakobetz* reviewed a district court's decision to admit testimony based on the new technique of "DNA fingerprinting," first introduced in 1988, which relies on person-to-person differences in DNA and which "has been widely hailed as a revolutionary forensic tool that takes some of the

uncertainty [as to identity] out of criminal convictions." Gina Kolata, *Critic of "Genetic Fingerprint" Test Tells of Pressure to Withdraw Paper*, N.Y. Times, Dec. 20, 1991, at A20, col. 4. Recent public criticisms by some scientists of the reliability of DNA fingerprinting have raised alarm in the law enforcement community, since under *Frye* "DNA evidence cannot be admitted in evidence unless the [government] establishes that there is a *consensus* among scientists that it is valid." *Ibid.* (emphasis added). Various state courts, plus the Eighth Circuit, have relied on *Frye* to sharply limit the use of DNA evidence, given the absence of such scientific consensus. *See, e.g.*, *Fight Erupts Over DNA Fingerprinting*, 254 Science 1721 (Dec. 20, 1991); Rorie Sherman, *DNA Evidence Dispute Escalates*, Nat'l L.J., Jan. 20, 1992, at 3, col. 1.

The Second Circuit avoided all these difficulties by recognizing that *Frye* has no place in the Federal Rules of Evidence -- as this Court can rule in this case, thereby promptly cutting off the existing turmoil and uncertainty in the lower courts over this point.

The defendant's arguments for use of *Frye*, the Second Circuit noted, asserted a "very real danger that the critical faculties" of lay jurors can be "overwhelmed by the highly technical features of forensic DNA testing" and an inability of the jury to "independently and critically scrutinize technical DNA evidence when confronted by the testimony of experts," which can create an "'aura of mystic infallibility.'" Slip op. at 22. The Second Circuit rejected these elitist arguments for using *Frye* or any other "general acceptance" rubric, holding: "Although we realize that DNA evidence does present special challenges, we do not think that they are so special as to require a new standard of admissibility. Despite the difficulties involved in cases with novel, complex and confusing evidence, the jury must retain its fact-finding function." Slip op. at 22. The court specifically "agree[d] with both Professor McCormick and Judge Weinstein" that continued use of the restrictive *Frye* rule is inconsistent with the Rules. *Id.* at 24-25. It also expressly rejected the extremely stringent *Frye* test applied to DNA fingerprinting by the Eighth Circuit in *United States v. Two Bulls*, 918 F.2d 56 (8th Cir. 1990), in which the Eighth Circuit denied the government's request for a holding that the Rules supersede *Frye*. Pet. 13 n.11.

The Ninth Circuit's *Daubert* decision (issued several weeks before *Jakobetz*) embraced the very "aura of mystic infallibility" concern that the Second Circuit rejected. *Daubert* held, relying on *Frye*, that:

> Expert opinion based on a scientific technique 'is admissible if it is generally accepted as a reliable technique among the scientific community.' . . . We impose this requirement because such evidence 'create[s] a substantial danger of undue prejudice or of confusing the issues or of misleading the jury . . . because of its aura of special reliability and trustworthiness.'"

Slip op. at 2-3 (citations omitted). In other words, *Daubert* joins the Fifth Circuit in relying on the common-law notion that judges should "protect" the jury from scientific evidence, without regard to Congress's policy choices in this regard.[4]

In sum, the Ninth Circuit has joined the *en banc* decision below in expanding "the *Frye* test to cover the content of an expert's *reasoning* rather than just the legitimacy of novel scientific techniques." Pet. 13 (emphasis in original). Both are in square conflict with the Third Circuit, *see supra* note 4, and now, after *Jakobetz*, with the Second Circuit as well. *Jakobetz*, in turn, is in express conflict with the Eighth Circuit's *Two Bulls* decision, which refused the government's request that *Frye* be eliminated. This counterproductive swirl of confusion and distraction can only grow in the future, particularly as to whether district court judges may (or must) use *Frye* to exclude all scientific evidence in criminal trials that does not enjoy scientific consensus. The most sensible means of clarifying the current controversy is for this Court to accept review in the earliest case properly presenting the *Frye* issue -- this case -- and rule that *Frye* simply may not be employed by the lower federal courts, for the straightforward reasons listed at Pet. 15-20, 28-30.

[4] Given this legal holding, *Daubert* affirmed exclusion of expert testimony based solely on the character of the reasoning process that experts used to evaluate published statistical data. The Ninth Circuit held that, even though the reasoning process involved was generally accepted in the field, an expert who had not first published his ultimate *conclusions* in a peer-reviewed journal, subject to "verification and scrutiny by others," had failed to comply with *every* aspect about scientific "consensus" concerning research methods, and therefore the jury could not consider the testimony. Slip op. at 7. Moreover, the *Daubert* opinion approvingly acknowledged the *en banc* majority opinion in this case. Slip op. at 8.

Daubert easily disposes of respondents' strained attempts to deny an inter-circuit conflict. Respondents claim that the Third Circuit's approach to scientific methodology is fundamentally in line with *Frye*, Opp. 14-16, even though the Third Circuit took great pains to reject *Frye* as an impermissibly restrictive relic of a bygone age of evidence, Pet. 14. *Daubert* acknowledged explicit conflict with the Third Circuit, stating: "Because the Third Circuit has specifically rejected the *Frye*[] 'generally accepted' standard, *United States v. Downing*, 753 F.2d 1224, 1236-37 (3d Cir. 1985), we find the court's analysis in *DeLuca* to be contrary to our established precedent and decline to follow it." Slip op. 6 n.2.

Respondents would have such urgently needed review delayed indefinitely, in deference to proposed revisions to Rule 702 which are undergoing preliminary analysis by a Judicial Conference working group, which *might* ultimately be adopted, and which supposedly *might* limit any precedential value of this case. Opp. 7-8. This radical suggestion cannot be taken seriously.[5]

[5] Respondents' suggestion raises several obvious problems:

(1) The point is institutionally suspect: review-worthy issues concerning the meaning of congressional statutes can often be met with reference to some sort of proposed legislative or administrative change that might pass in the future and that might change the terrain. For this Court to tumble through such tea leaves in deciding on certiorari goes beyond its adjudicatory role. In particular, respondents' argument requires this Court to guess that Congress will agree to the proposal's policy choice. Taken seriously this argument would encourage the floating of legislative or administrative proposals merely to influence certiorari.

(2) It is not clear that the Rule 702 proposal would markedly change existing practice -- and there is significant opposition to any change, suggesting that no revision may ever pass. Both points are amply demonstrated by Judge Weinstein's leading essay on this proposal. *See* Jack B. Weinstein, *Rule 702 of the Federal Rules of Evidence is Sound; It Should Not Be Amended*, 138 F.R.D. 631, 633-34, 638-39 (1991).

(3) *This* case does not implicate the proper use of Rule 702; it involves the *Frye* rule and Rule 703. *See* pp. 3-4, note 2, *supra*. Moreover, this case is an apt vehicle for reminding the lower federal courts that the Rules of Evidence are a statute that must be construed with strict adherence to their language – a point relevant to all federal evidence law, not just to expert testimony rules.

(4) Grant of review in this case would assist, not impede, consideration of the proposal in the early stages, because briefing, argument and decision will illuminate the choices made by Congress in initially passing the Rules. A ruling in this case may also assist this Court, and ultimately Congress, in assessing the current state of evidence doctrine nationwide, which is essential to determining the effect of any proposal.

(5) The time for final implementation of the proposed change is almost *two years* away. Any proposal could not go into effect until December 1, 1993. *See Federal Rules: Major Changes Sought By Judicial Conference Working Group*, 60 U.S.L.W. 2158 (1991), at 2158. The issues identified in the Petition are simply too important for such delay.

III. CERTIORARI IS WARRANTED ON RULE 703

The Opposition nowhere rebuts the obvious need for this Court to review the *en banc* majority's conversion of Rule 703 into an all-purpose tool for scrutiny of the weight of particular facts or data used by an expert. As explained by Chief Judge Clark, *see supra* p. 4, and by the Petition, at 5-6, 20-25, the error is two-fold: (1) no scrutiny of *admissible* facts or data is permitted by Rule 703; and (2) as to *inadmissible* facts or data the only inquiry is into the "type" of facts or data considered in addressing "the subject" -- not the weight of the facts or data used in forming the conclusion. The severe circuit split is undenied. Respondents agree with us, Pet. 25, that the Second and Tenth Circuit follow the Fifth Circuit in using Rule 703 to scrutinize weight and credibility. *See* Opp. 11-12 n.2. Exhaustively quoted caselaw from the First, Third, Fourth and Eighth Circuits demonstrates on the face of the Petition that *at least* these four circuits forbid use of Rule 703 to judge weight or credibility, Pet. 22 n.14, 22-25 -- and easily refutes the unsupported assertion that these circuits merely "allow[] an expert to rely on inadmissible evidence." Opp. 12. Of the jumble of cases thrown into Opp. 11-12 n.2, some are JNOV or summary judgment cases unrelated to evidence law; few of the others cite even a single rule of evidence; and none refutes the key circuit split just summarized.

IV. THE CONSTITUTIONAL ISSUES MERIT REVIEW

As to *Erie*, Opp. 26-27, it was new in the Petition because only at the *en banc* stage was *Frye* imposed, overriding Texas law (which excludes *Frye*) without the necessary "clear statement." Pet. 29. The other two constitutional points are equally worthy of review, and respondents offer no relevant rebuttal either.

CONCLUSION

For all these reasons, certiorari should be granted.

Respectfully submitted,

LAURENCE H. TRIBE
Counsel of Record
1525 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-1767

January 23, 1992